

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL
AMENDMENTS) BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and new clauses to be moved on behalf of the Government

(Circulated by the authority of the Minister for Justice,
the Honourable Duncan Kerr, MP)

AMENDMENTS TO THE EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1994

OUTLINE OF AMENDMENTS

The amendments make minor policy and technical or drafting changes to the Evidence (Transitional Provisions and Consequential Amendments) Bill 1994.

2. The minor policy amendments will:

enable a procedural step on which a provision of the *Evidence Act 1994* depends to be taken before that Act comes into operation and, where such a step is taken before that time, provide for the expiry of time limits for further consequential steps after the commencement of the new Act; and

amend relevant provisions of Part 1AA of the *Crimes Act 1914* to ensure consistency between that Part and Part 3.9 of the Evidence Bill 1993.

Financial Impact Statement

The amendments are not expected to have any significant financial impact on Commonwealth expenditure or revenue.

NOTES ON AMENDMENTS AND NEW CLAUSES

Clause 2: Commencement

Amendment 1

3. This amendment amends clause 2 so that it provides for the commencement of Part 3 of the Bill. Part 3 provides for the continued application of provisions of Acts repealed or amended by the Bill in proceedings that are part-heard at the time of the repeal or amendment, and for the continued operation in certain circumstances of the present law in relation to visual identification evidence and the propriety of questioning by an official when no caution has been administered.

Amendment 2

4. This amendment amends clause 2 to provide for the commencement of operation of the amendments to sections 3ZM and 3ZO of the *Crimes Act 1914*, which are proposed in Amendment 7. The amendments will commence on the day on which the relevant provisions of the Evidence Act commence, or a day fixed by Proclamation, whichever is the earlier.

Amendment 3

5. This amendment amends clause 2 to provide for the commencement of the amendment to the *Industrial Relations Act 1988* which is proposed in Amendment 8.

Clause 4: Proceedings already begun.

Amendment 4

6. This amendment makes a drafting amendment to clause 4 consequential on Amendment 5.

New clauses 4A, 4B, 4C, 4D, 4E, 4F and 4G.

Amendment 5

7. This amendment inserts new clauses 4A, 4B, 4C, 4D, 4E, 4F and 4G in the Bill.

8. The operation of some provisions of the Evidence Bill 1993 depends upon a procedural step being taken before the hearing of a proceeding. New clauses 4A, 4B,

4C, 4D, 4F and 4G make it clear that such steps can be taken before the Evidence Act comes into operation. Otherwise it is arguable that those provisions, which depend upon prior action being taken, would not be fully operative until some time after commencement of the Act. That might in turn lead to hearings being adjourned so that the provision of the Act can be used. The new clauses also provide, where a procedural step is taken before commencement, for the expiry of time limits for further consequential steps after the commencement of the Act.

9. New clause 4E is a transitional provision relating to persons authorised for the purposes of clause 171 of the Evidence Act.

10. New clause 4A provides that documents referred to in the provisions of the Evidence Act listed in subclause 4A(1) may be given or served before commencement of the Evidence Act. It also provides, in relation to those provisions where service of a document causes a period to commence during which some other action is to be taken, that the period expires at the later of 21 days after service and 7 days after commencement of the provision concerned.

11. New clause 4B provides that for the purposes of paragraph 50(2)(b) of the Evidence Act, which relates to proof of voluminous or complex documents, a reasonable opportunity to inspect or copy a document can be given before commencement of section 50.

12. New clause 4C provides, in effect, that notice of intention to adduce tendency evidence or coincidence evidence may be given before the commencement of section 97 or section 98 respectively of the Evidence Act.

13. New clause 4D provides that a party may make a request to another party under section 167 of the Evidence Act (which relates to determination of questions about previous representations, evidence of convictions and the authenticity, identity or admissibility of a document or thing) before the commencement of section 167.

14. New clause 4E provides that -

a person who was authorised by the Attorney-General under paragraph 7J(4)(b) of the *Evidence Act 1905* before the commencement of section 171 of the new Evidence Act; and

a person who, before the commencement of section 171 of the Evidence Act is authorised by the Attorney-General under that section,

will be taken to be an authorised person for the purposes of paragraph 171(3)(d) of the Evidence Act.

15. An authorised person may, under both Acts, give evidence relating to business records where it would not be reasonably practicable or would cause undue expense to call as a witness a person who had a position of responsibility in relation to the making or keeping of the record.

Clause 5: Identifications already carried out.

Amendment 6

16. This amendment amends clause 5 of the Bill to provide that section 115 of the Evidence Act (which makes inadmissible certain picture identification evidence) does not apply with respect to an identification made before the commencement of that section.

New clauses 9A and 9B

Amendment 7

17. This amendment amends sections 3ZM and 3ZO of the *Crimes Act 1914*.

18. Except for the amendment to subsection 3ZM(7), the amendments are proposed only to ensure consistency between Part 3.9 of the Evidence Act and Part 1AA of the *Crimes Act 1914*.

19. Part 3.9 of the Evidence Act provides exclusionary rules for -

- prosecution visual identification evidence (providing a general rule that an identification parade must have been held prior to the act of identification where it would have been reasonable to have held one); and
- prosecution visual identification evidence based wholly or partly on an examination of pictures kept for use by police officers.

20. The relevant provisions of Part 1AA of the *Crimes Act 1914* set out requirements for the holding of identification parades in relation to Commonwealth offences, and rules for showing witnesses photographs or pictures for identification purposes when a suspect is in custody for a Commonwealth offence, or is otherwise available to take part in an identification parade.

21. Paragraph 3ZM(2)(b) of the *Crimes Act 1914* provides that an identification parade requested by such a suspect must be held if it is reasonable in the circumstances to hold one.

22. New subsection 3ZM(2A) sets out factors that must be taken into account in deciding whether it is reasonable to hold such a parade. The factors are similar to those that must be taken into account by a court under subsection 114(3) of the *Evidence Act 1994* in deciding whether it was reasonable to hold an identification parade that included the defendant in a criminal proceeding.

23. An amendment is also proposed to subsection 3ZM(7) of the *Crimes Act 1914*. Subsection 3ZM(7) gives statutory force to the common law in relation to -

the admissibility of certain evidence (a suspect's refusal to take part in an identification parade, and in that event, alternative methods of identification); and

inferences which may be drawn from a refusal to take part in an identification parade.

24. It is understood that the intention of the subsection is to preserve certain specific common law rules from being affected by Part 1AA of the *Crimes Act 1914*.

25. However, questions of the admissibility of evidence can depend upon the operation of many evidentiary rules (for example, rules relating to the competence and compellability of witnesses, the hearsay rule, rules relating to documentary evidence).

26. The effect of subsection 3ZM(7) is to make the common law prevail over the Evidence Act (because of section 8 of that Act), any future State or Territory legislation similar to that Act and also existing State and Territory evidence legislation.

27. The amendment to subsection 3ZM(7) will ensure that the *Crimes Act 1914* does not affect the determination of the matters stated in paragraphs 3ZM(7)(a),(b) or (c), rather than giving statutory force to the common law in relation to those matters.

28. Subsection 3ZO(1) sets out a general rule that a witness should not be shown photographs or pictures for identification purposes where a suspect is in custody for a Commonwealth offence or is otherwise available to take part in an identification parade. Exceptions are provided where the suspect has refused to take part in a parade or holding one would be unfair to the suspect or unreasonable in the circumstances.

29. New paragraph 3ZO(1)(aa) provides a further exception enabling a witness to be shown photographs or pictures where the suspect's appearance has changed significantly since the offence was committed. A similar exception applies under paragraph 115(4)(a) of the Evidence Act to the requirement in that Act that picture identification evidence adduced by the prosecutor in a criminal proceeding is not admissible if the defendant was in police custody when the pictures were examined and the picture of the defendant that was examined was made before he or she was taken into custody.

30. Subparagraph 3ZO(1)(b)(ii) of the *Crimes Act 1914* provides an exception to the general rule referred to above where the holding of an identification parade would be unreasonable in the circumstances. New subsection 3ZO(1A) sets out factors that must be taken into account in deciding whether it is unreasonable in the circumstances to hold such a parade. The factors are similar to those that must be taken into account by a court under subsection 114(3) of the Evidence Act in deciding whether it was reasonable to hold an identification parade that included the defendant in a criminal proceeding.

31. Subsection 3ZO(2) sets out rules that apply when a police officer shows a witness photographs or pictures for identification purposes. New paragraph 3ZO(2)(ba) provides that the photographs or pictures shown to the witness must not suggest they are photographs or pictures of persons in police custody. A similar requirement applies to picture identification evidence adduced by the prosecutor under subsection 115(3) of the Evidence Act.

New clause 13A

Amendment 8

32. This amendment repeals subsections 474(2) and (3) of the *Industrial Relations Act 1988*. These subsections, which provide for oaths and affirmations in the Industrial Relations Court, are made redundant by the Evidence Act.

